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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
SAN FERNANDO VALLEY DIVISION**

In re:
FRANCHISE PICTURES LLC, *et. al.*,
Debtor(s).

MORGAN CREEK PRODUCTIONS, INC.,
Plaintiff(s),
v.
FRANCHISE PICTURES LLC, a Delaware
limited liability company and FRANCHISE
ENTERTAINMENT LLC, a California
limited liability company,
Defendant(s),
OFFICIAL COMMITTEE OF
UNSECURED CREDITORS,
Intervenor-Defendant.

Bk. No. SV 05-13855 MT
Chapter 11 (Jointly Administered)
Adv. No. SV 07-01080 MT

**MEMORANDUM OF DECISION RE:
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

I. INTRODUCTION

Defendants Franchise Pictures LLC and Franchise Entertainment LLC
(collectively referred to as "Franchise") filed a Motion for Partial Summary Judgment,
requesting the court to dismiss claims one, two, and seven of Plaintiff Morgan Creek

1 Productions, Inc.'s ("Morgan Creek" or "MCP") First Amended Complaint ("FAC") with
2 prejudice. Specifically, Franchise argues that (1) Morgan Creek's State Court Liens are
3 not perfected or enforceable and (2) the copyright mortgages do not secure Franchise's
4 indebtedness. For the reasons stated below, Franchise's motion for partial summary
5 judgment is granted.

6
7 **II. FACTS**

8 Franchise Pictures LLC ("Franchise Pictures") is a limited liability company
9 organized under the laws of Delaware on April 23, 1998. Franchise Entertainment LLC
10 ("Franchise Entertainment") is a limited liability corporation organized under the laws of
11 California on September 21, 1998.

12 1998 Agreement

13 Morgan Creek entered into an agreement with Franchise Entertainment on
14 October 20, 1998 ("1998 Agreement"). Under that agreement, Franchise was to
15 produce eight motion pictures for distribution by Morgan Creek. Morgan Creek was to
16 receive distribution rights and certain allocation of proceeds and revenues. Specifically,
17 Paragraph 2 of the 1998 Agreement states: "[Morgan Creek] will acquire all distribution
18 rights to the [Motion Pictures] in all media in perpetuity in the United States and Canada
19 and their respective territories and possessions (the 'Territory')."

20 Under Paragraph 4 ("Allocation of Proceeds") of the 1998 Agreement, "gross
21 receipts" were to be "allocated as follows":

- 22 (a) MCP shall retain a distribution fee equal to 15% of the gross receipts.
23 (b) MCP shall recoup the following distribution expenses charged to MCP
24 by Warner: MPAA dues and assessments, taxes and checking and collection
25 costs (the "MCP Distribution Expenses").
26 (c) FE [Franchise Entertainment] shall recoup the distribution expenses
it advances under Paragraph 6 [of the October 1998 Agreement].
(d) FE shall recoup the negative cost of the applicable Qualifying Film on
a worldwide basis.

1 (e) MCP shall receive (i) a 15% share of the balance of all revenues from
2 the Territory, plus (ii) 15% of the gross revenues of the applicable Qualifying
3 Film outside the Territory (after deduction of a 15% sales fee by FE and FE's
4 actual ongoing sales costs on the revenues outside the Territory).

5 See Vandell Decl. Ex. 4 (October 1998 Agreement).

6 At the time that the 1998 Agreement was entered into between Morgan Creek
7 and Franchise, the Motion Pictures had not been made or even identified. The 1998
8 Agreement refers only to an agreement between the parties related to "[t]he next eight
9 (8) motion pictures financed, produced, controlled and/or acquired" by Franchise. See
10 Vandell Decl., Exh. 4, ¶ 1.

11 Morgan Creek claims that since the signing of the 1998 Agreement, Franchise
12 has failed to pay money owed to Morgan Creek pursuant to the 1998 Agreement,
13 leading to multiple rounds of litigation.

14 The 2000 Agreements or "Copyright Mortgages"

15 In 2000, Morgan Creek entered into an Exclusive License of Distribution Rights,
16 Security Agreement and Mortgage of Rights, Including Copyright for each of the eight
17 qualifying Motion Pictures (collectively, the "Copyright Mortgages"). The eight qualifying
18 Motion Pictures were subsequently delivered between February 2000 and August
19 2001¹. Certain provisions of these Copyright Mortgages and how they relate to the
20 1998 Agreement control in part whether Morgan Creek has a secured claim against
21 Franchise.

22 The Copyright Mortgages granted Morgan Creek a security interest in certain
23 distribution rights in the Motion Pictures and in various collateral set forth in the
24 Copyright Mortgages. Paragraph 1 of the Copyright Mortgages grants Morgan Creek in
25 perpetuity certain distribution rights ('Distribution Rights') in the "Territory," a defined

26 ¹February 18, 2000 (The Whole Nine Yards); May 12, 2000 (Battlefield Earth); August 25, 2000 (Art of War); September 21, 2000 (Get Carter); January 19, 2001 (The Pledge); February 23, 2001 (3000 Miles to Graceland); May 18, 2001 (Angel Eyes); and August 27, 2001 (The Heist)

1 term consisting of the "United States, Canada, and their respective commonwealths,
2 territories and possessions."

3 The second paragraph of the Copyright Mortgages explains at the outset that
4 these rights are subject to Warner Brothers' ten-year distribution term: "It is
5 acknowledged that Secured Party [Morgan Creek] has sublicensed the Distribution
6 Rights to Warner Bros. (Warner') for a period of ten (10) years after the delivery of the
7 Picture to Warner (the `Warner Distribution Term')." See Vandell Decl. Exs. 9-17
8 (Copyright Mortgages ¶ 1).

9 Paragraph 2 then proceeds to describe the security interests transferred to
10 Morgan Creek. Paragraph 2(a), called "Grant #1" encompasses the distribution rights
11 collateral and reads as follows:

12 In order to secure Secured Party's Distribution Rights in the Picture for the
13 Territory after the Warner Distribution Term, and in consideration of Secured
14 Party's agreements in connection with the exploitation of the Picture, Debtor
15 hereby grants and assigns to Secured Party a continuing security interest in
and copyright mortgage on all of Debtor's right, title and interest in and to the
items listed in (i)-(vi) below associated with or relating to the Picture
("Distribution Rights Collateral").

16 See Vandell Decl. Exs. 9-16 (Copyright Mortgages 2(a)). Paragraph 2(b) then
17 describes "Grant #2" of the Copyright Mortgages, known as the "Proceeds Collateral"
18 as follows:

19 Solely to the extent necessary to secure Secured Party's right to receive the
20 revenues to which it may be entitled to under Paragraph 4(e) of the
21 Multi-Picture Agreement [October 1998 Agreement], and in consideration of
22 Secured Party's agreements in connection with the exploitation of the Picture,
23 Debtor [Franchise] hereby grants and assigns to Secured Party a continuing
24 security interest in and *to the* copyright mortgage on all of Debtor's right, title
25 and interest in and to all of Debtor's rights in and to those certain accounts,
inventories, and general intangibles, the proceeds of which are defined as
26 monies to which Secured Party may be entitled to under Paragraph 4
[restricted to subsection (e) in the Art of War and Get Carter Copyright
Mortgages] of the Multi-Picture Agreement (and in any bank account into
which such proceeds have been or are to be deposited) derived from or
arising out of the Distribution Rights in the Territory after the Warner
Distribution Term, and all other items deemed Inventories, Equipment,

1 Accounts and General Intangibles (as defined under the California Uniform
2 Commercial Code or other applicable law) derived from or arising out of the
3 Distribution Rights in the Territory after the Warner Distribution Term (the
4 foregoing being referred to as the "Proceeds Collateral").

5 See Vandell Decl. Exs. 9-17 (Copyright Mortgages ¶ 2(b)) (italics added).

6 For purposes of this ruling, agreements relating to all eight of the movies will be
7 discussed as a group as the differences between them do not affect the issues to be
8 decided in this motion².

9 Franchise did not hold a copyright mortgage in the Motion Pictures at any time
10 prior to or at the time the Copyright Mortgages were granted to Morgan Creek. See
11 Turner Decl. ¶11; Vandell Decl. Exs. 9-17 (Copyright Mortgages). In 2000, before any
12 of the litigation began, Morgan Creek filed with the Copyright Office a separate
13 copyright mortgage on each of the eight Motion Pictures ("Copyright Mortgages").

14 Franchise argues that it has not received, after filing its bankruptcy petition, any
15 proceeds (the "Participation Proceeds") arising from distribution of the Motion Pictures
16 in the North American territory (the "Territory") as reflected in participation statements
17 between Franchise and Morgan Creek Productions, Inc. See Brincko Decl. ¶ 2; FAC
18 21-24. Franchise also claims it does not have on hand any Participation Proceeds
19 received pre-petition. Morgan Creek disputes this and seeks discovery before any
20 determination is made on this issue.

21 Superior Court Judgment

22 On March 12, 2004, the Los Angeles Superior Court issued a judgment (the

23 ²Six of the eight Copyright Mortgages are identically worded, involving the same two grants ("Grant
24 #1" and "Grant #2") of security interests. Shorter than the other eight Copyright Mortgages, the Get Carter
25 Copyright Mortgage does not involve Grant # 1 of security interest. See Vandell Decl. Ex. 17 (Get Carter
26 Copyright Mortgage). The Art of War Copyright Mortgage involves two separate agreements, one between
Filmline International Inc. and Morgan Creek (the "Filmline -Morgan Creek Agreement") (Vandell Decl. Ex. 15),
and one between Franchise Pictures and Morgan Creek (the "Franchise - Morgan Creek Agreement") (Vandell
Decl. Ex. 16). The Filmline - Morgan Creek Agreement does not involve Grant #2 of security interest but does
include Grant #1. The Franchise - Morgan Creek Copyright Mortgage does not involve Grant #1 of security
interest but does include Grant #2. See Vandell Decl. Exs. 15-16 (collectively the "Art of War Copyright
Mortgage").

1 "State Court Judgment") in a dispute between Morgan Creek and Franchise, case no.
2 BC 280023, addressing breach of contract, fraud, and other issues arising from the
3 October 1998 Agreement and the December 2001 Agreement (the "December 2001
4 Agreement"). See Vandell Decl. Ex. 18 (State Court Judgment); FAC ¶¶ 9, 16-17.

5 The State Court Judgment included damages for breaching the implied covenant
6 of good faith and fair dealing in the December 2001 Agreement (\$996,674) and for
7 breaching the October 1998 Agreement by: (1) Setting a "litigation reserve" on
8 participation statements to Morgan Creek for Art of War (\$300,417) and (2) Deducting
9 "Foreign Residuals" on participation statements to Morgan Creek for The Whole Nine
10 Yards (\$97,148). See Vandell Decl. Ex. 18 (State Court Judgment). In connection with
11 the State Court Judgment, Morgan Creek filed a Notice of Judgment Lien with the
12 California Secretary of State against Delaware-organized Franchise Pictures LLC on
13 March 18, 2004. See Vandell Decl. Ex. 19 (Notice of Judgment Lien); FAC ¶ 11.

14 Also in connection with the State Court Judgment, Morgan Creek filed an Order
15 to Appear for Examination Lien ("ORAP Lien") against California-organized Franchise
16 Entertainment LLC on March 16, 2004, and served the ORAP Lien on Franchise
17 Entertainment's Chief Financial Officer, Hans Turner, on March 24, 2004. See Vandell
18 Decl. Ex. 20 (ORAP Lien); Turner Decl. ¶ 12.

19 Morgan Creek did not file a renewal or extension of the ORAP Lien because of
20 its belief that an extension was not necessary because the one-year duration of the
21 ORAP lien was tolled when Franchise Entertainment filed for bankruptcy on August 18,
22 2004 in case no. SV 05-13855 MT.

23 Administrative Expense Motion

24 In June 2005, Morgan Creek filed a Motion to Compel Payment of Post-Petition
25 Administrative Expenses (the "Administrative Expense Motion"), seeking participation
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1 fees under the distribution agreements. See Vandell Decl. Ex. 21 (Notice of Motion and
2 Motion to Compel Payment of Post-Petition Administrative Expense Claim to Creditor
3 Morgan Creek Productions Inc., In re Franchise Pictures, June 10, 2005).

4 In September 2005, the Court denied Morgan Creek's Administrative Expense
5 Motion. See Vandell Decl. Ex. 22 (Order Denying Motion to Compel Payment of
6 Post-Petition Administrative Expense Claim to Creditor Morgan Creek Productions Inc.,
7 In re Franchise Pictures, Sept. 7, 2005); Vandell Decl. Ex. 20 (Hearing Transcript on
8 Motion by Creditor Morgan Creek Productions to Compel Payment of Post-Petition
9 Administrative Expense Claim (Aug. 18, 2005)).

10 During the Administrative Expense proceedings, Morgan Creek asserted that it
11 "is the distributor of [the Motion Pictures] by the October '98 agreement. It is doing so
12 through Warner Brothers." See Vandell Decl. Ex. 23 (Administrative Expense Hearing
13 at p. 50, lines 21-23). Morgan Creek also admitted that "Morgan Creek itself is not
14 doing anything in incurring detriment that we know of. It really is Warner Brothers that's
15 engaging in the [film distribution] activity." See id. (Administrative Expense Hearing at
16 p. 19, lines 12-17).

17 Executory Contract Motion

18 In August 2006, Morgan Creek filed a Motion to Compel Assumption of
19 Executory Contracts (the "Assumption Motion"), asking this Court to compel Franchise
20 to assume the distribution agreements and requiring Franchise to cure all obligations
21 outstanding. See Vandell Decl. Ex. 24 (Assumption Motion, In re Franchise Pictures,
22 Aug. 18, 2006). In September 2006, the Court denied Morgan Creek's Assumption
23 Motion, ruling that these were not executory contracts. See Memorandum of Decision
24 and Order on Morgan Creek's Motion to Compel Assumption of Executory Contracts, In
25 re Franchise Pictures, Sept. 5, 2006.

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1 Asset Purchase Agreement

2 In September 2006, Morgan Creek and FPLAC LLC (collectively, the
3 "Purchasers") entered into an Asset Purchase Agreement, approved by the Court,
4 under which Morgan Creek bought from Franchise the right to assets that included the
5 Motion Pictures (the "Asset Sale," which generated "Sale Proceeds" for Franchise).
6 See Purchase Agreement between Franchise Pictures LLC and Certain Affiliates and
7 SPE Holding Corp. and Certain Affiliates and FPLAC LLC and Morgan Creek
8 Productions, Inc. (Sept. 1, 2006)) ("Asset Purchase Agreement"); Order Granting
9 Motion to Approve Sale of Franchise Assets of Liens and Interests, Sept. 8, 2006.

10 Adversary Complaint

11 On May 3, 2007, Morgan Creek commenced an adversary proceeding against
12 Franchise, adv. no. SV 07-01080 MT. Morgan Creek's First Amended Complaint, filed
13 on May 10, 2007, asks for, among other things: determination of validity, priority and
14 extent of Judgment liens; determination of validity, priority and extent of the Copyright
15 Mortgages; and for turnover of monies subject to secured claims.

16 On October 2, 2007, Franchise filed a Motion for Partial Summary Judgment,
17 requesting that this court dismiss claims one, two, and seven of Morgan Creek's First
18 Amended Complaint with prejudice, hold that Morgan Creek does not have any secured
19 claims on any property of Franchise by reason of the Copyright Mortgages, hold that
20 Morgan Creek's State Court Liens are not perfected or enforceable, and hold that the
21 copyrights do not secure the indebtedness under the Judgment.

22 To the extent any uncontroverted fact is deemed a conclusion of law, it is
23 incorporated herein by reference as if set out in full.

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1 **III. DISCUSSION**

2 Under F.R.C.P. Rule 56(c), incorporated by F.R.B.P. Rule 7056, summary
3 judgment should be granted "if the pleadings, depositions, answers to interrogatories,
4 and admissions on file, together with the affidavits, if any, show that there is no genuine
5 issue as to any material fact and that the moving party is entitled to a judgment as a
6 mater of law." The moving party has the burden of establishing the absence of a
7 genuine issue of material fact. Celotex Corp. vs. Catrett, 477 U.S. 317, 323 (1986). If
8 the moving party shows the absence of a genuine issue of material fact, the nonmoving
9 party must go beyond the pleadings and identify facts that show a genuine issue for
10 trial. Id. at 324. The court must view the evidence in the light most favorable to the
11 nonmoving party. Bell v. Cameron Meadows Land Co., 669 F.2d 1278, 1284 (9th Cir.
12 1982). All reasonable doubt as to the existence of a genuine issue of fact should be
13 resolved against the moving party. Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976).
14 Moreover, the inference drawn from the underlying facts must be viewed in the light
15 most favorable to the party opposing the motion. Valadingham v. Bojorquez, 886 F.2d
16 1135, 1137 (9th Cir. 1989).

17 **First Claim For Relief**

18 Morgan Creek's first claim for relief in its First Amended Complaint is for
19 determination of validity, priority and extent of the judgment liens of Morgan Creek
20 arising from the Judgment. Specifically, Morgan Creek seeks in its First Amended
21 Complaint that it "is entitled to a determination by this [c]ourt that the pre-petition date
22 judgment liens, were, as of the petition date and at all relevant times thereafter, duly
23 perfected and not avoidable liens against the personal property of Franchise
24 Entertainment and Franchise Pictures, and both of them, and that such liens are valid
25 and enforceable against the proceeds, to the extent of the Judgment, including the
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1 continuing statutory interest thereon" ("Claim #1").

2 Judgment Lien

3 Franchise first argues that the Morgan Creek Notice of Judgment Lien against
4 Franchise Pictures is invalid under California law because Franchise Pictures is a
5 Delaware company. Morgan Creek filed a Notice of Judgment Lien against Franchise
6 Pictures with the California Secretary of State. Filing a Notice of Judgment Lien in
7 California is not a valid means to create a judicial lien against the California personal
8 property of a non-California business. See In re Aura Systems, 347 B.R. 720, 725
9 (Bankr. C.D. Cal. 2006); Cal. Code Civ. Proc. §697.510, 697.530; Cal. Com. Code §§
10 9307(e), 9301(1); 6 Del. C. §§ 9-310, 9-501(a). Since the lien was only filed in California
11 and not Delaware, the Notice of Judgment Lien against Franchise Pictures is invalid.

12 Franchise Assets

13 Franchise argues that the ORAP Lien is worthless because Franchise
14 Entertainment has no assets. Morgan Creek's opposition argues that this is an
15 assertion of fact that is the subject of pending discovery propounded by Morgan Creek
16 and that it has not yet had an opportunity to conduct discovery on this issue. Morgan
17 Creek requests a F.R.C.P. Rule 56(f) continuance. Pursuant to F.R.C.P. Rule 56(f),
18 made applicable by F.R.B.P. Rule 7056, "Should it appear from the affidavits of a party
19 opposing the motion that the party cannot for reasons stated present by affidavit facts
20 essential to justify the party's opposition, the court may refuse the application for
21 judgment or may order a continuance to permit affidavits to be obtained or depositions
22 to be taken or discovery to be had or may make such other order as is just." Under
23 F.R.C.P. Rule 56(f), "[t]he burden is on the party seeking further discovery to proffer
24 sufficient facts to show that the evidence sought exists and that it would prevent
25 summary judgment," but the court "does not abuse its discretion by denying further
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1 discovery if the movant had failed diligently to pursue discovery in the past." Nidds v.
2 Schindler Elevator Corp., 113 F.3d 912, 921 (9th Cir. 1996).

3 Morgan Creek specifically argues that the subject of Morgan Creek's pending
4 discovery requests involve the parties' intent in Paragraph 2(b) of the Copyright
5 Mortgages and whether Franchise Entertainment has ever had any assets. While a
6 Rule 56(f) request soon after the filing of a complaint would normally carry significant
7 weight, the current request follows years of Morgan Creek's access to Franchise
8 records and employees.

9 There appears to be no dispute that Morgan Creek conducted extensive
10 discovery for purposes of "multiple rounds of litigation" in the Superior Court against
11 Franchise and Franchise Entertainment from 2001 through 2004. As this litigation
12 concerned what monies were due Morgan Creek under the agreements, the assets in
13 Franchise's possession would have been covered in that discovery. Following its
14 judgment, Morgan Creek allegedly spent two weeks reviewing documents at
15 Franchise's headquarters and conducted numerous debtor examinations to explore the
16 financial condition of the Franchise entities. See Reply Declaration of Hans Turner.

17 Morgan Creek argues that the attorney who supervised the post-judgment
18 discovery is not currently available to it because of subsequent employment issues not
19 relevant here. While that attorney may not be able to assist in reviewing the discovery
20 that was already produced, Morgan Creek does not explain why that discovery is not in
21 its possession for other counsel to review.

22 This bankruptcy case has also been pending for well over three years. If Morgan
23 Creek has intended to pursue a secured claim all this time, it does not explain why no
24 effort was made to gather previous discovery documentation for review or to make
25 additional requests of the debtor. It has litigated an administrative expense claim, an
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1 executory contract motion and the asset purchase agreement and never mentioned its
2 lack of access to such essential information. In fact, since Morgan Creek qualified as a
3 potential bidder during the Asset Purchase Agreement process, it was, along with other
4 potential bidders, given access to extensive information about all of the administratively
5 consolidated debtors' assets in an effort to ascertain the value thereof.

6 This case is winding to a close after six continuous years of disputes between
7 Franchise and Morgan Creek, and the summary judgment motion must be viewed in
8 that context. Morgan Creek's one assertion that limited discovery may be appropriate
9 as to the issue of whether Franchise Pictures and Franchise Entertainment are
10 essentially the same entity may deserve consideration. Because Franchise's own
11 substantive consolidation complaint was placed on hold to conserve resources pending
12 further developments in the bankruptcy case, discovery on that issue was placed on
13 hold for all parties. Thus, extremely limited and narrow discovery may be necessary for
14 Morgan Creek to adequately respond to the question of what assets the ORAP lien
15 seeks to secure.

16 Because all reasonable doubt and inference is viewed in light most favorable to
17 Morgan Creek, the nonmoving party, see Valadingham v. Bojorquez, 886 F.2d at 1137,
18 Hector v. Wiens, 533 F.2d at 432, for the purpose of this motion, this court must assume
19 that Franchise Entertainment has potential assets, and the ORAP Lien may not be
20 worthless. The question of the parties' intent in the agreements is discussed
21 subsequently.

22 Expiration of the ORAP Lien

23 Franchise argues that the ORAP Lien expired in March 2005 and is therefore
24 invalid. According to California Code of Civil Procedure §708.110(d), "Service of the
25 order creates a lien on the personal property of the judgment debtor for a period of one
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1 year from the date of the order unless extended or sooner terminated by the court."
2 Franchise argues that the service date was March 2004 and the ORAP Lien expired in
3 March 2005. Franchise filed its Chapter 11 petition on August 18, 2004. The question
4 is whether the one-year duration of the ORAP Lien was tolled or extended in order to
5 avoid the March 2005 expiration provided for under § 708.110(d).

6 Under 11 U.S.C. § 108(c): "if applicable nonbankruptcy law, an order entered in a
7 nonbankruptcy proceeding, or an agreement fixes a period for commencing or
8 continuing a civil action in a court other than a bankruptcy court on a claim against the
9 debtor, . . . and such period has not expired before the date of the filing of the petition,
10 then such period does not expire until the later of--(1) the end of such period, including
11 any suspension of such period occurring on or after the commencement of the case; or
12 (2) 30 days after notice of the termination or expiration of the stay . . . with respect to
13 such claim." This section generally applies "to time periods within which a creditor must
14 bring an action to enforce a lien before the lien expires. It also applies to the time
15 period to renew a judgment to maintain its enforceability." 4 Collier on Bankr. ¶
16 108.04[2] (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 15th ed. rev. 2007)
17 (footnotes omitted).

18 As the bankruptcy case is still pending, and no relief from stay has been granted,
19 the ORAP lien still continues in force at this time. See also In re Burns, 291 B.R. 846,
20 849 n3 (9th Cir. B.A.P. 2003).

21 Federal Preemption

22 Franchise further argues that the ORAP Lien does not encumber the copyrights
23 for the Motion Pictures or proceeds thereof. In In re World Auxiliary Power Company,
24 303 F.3d 1120, 1128 (9th Cir. 2002), the Ninth Circuit held that "there can be no
25 question that, when a copyright has been registered, a security interest can be
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1 perfected only by recording a transfer in the Copyright Office," and further held
2 unregistered copyrights need not be registered in the Copyright Office. In re Peregrine
3 Entertainment, Ltd., adopted substantially by World Auxiliary, held that "any state
4 recordation system pertaining to interest in copyrights would be preempted by the
5 Copyright Act." 116 B.R. 194, 194 (C.D. Cal. 1990). The Copyright Act provides that
6 "[a]ny transfer of copyright ownership or other document pertaining to a copyright" may
7 be recorded in the U.S. Copyright Office. 17 U.S.C. §205(a). Peregrine explained that
8 "[r]ecording in the U.S. Copyright Office, rather than filing a financing statement under
9 Article Nine, is the proper method for perfecting a security interest in a copyright." 116
10 B.R. at 203.

11 Relying on Peregrine and World Auxiliary Power, Franchise argues that the only
12 way to perfect the copyrights is to register the ORAP Lien with the U.S. Copyright
13 Office, which Morgan Creek failed to do. It is undisputed that the copyrights at issue are
14 all registered with the U.S. Copyright Office. Morgan Creek argues that application of
15 Peregrine's analysis to an ORAP lien would be an unwarranted extension. Relying on
16 Broadcast Music, Inc. V. Hirsch, 104 F. 3d 1163 (9th Cir 1997), it argues that the ORAP
17 lien is more like an assignment of royalties that does not have to be recorded in the
18 Copyright Office.

19 While Peregrine and World Auxiliary Power employ broad terms as to whether
20 federal copyright law preempts state law security interests, both addressed solely
21 federal Copyright Act preemption as applied to the filing of a UCC-1 financing statement
22 pursuant to California's version of the old Article 9 of the Uniform Commercial Code.
23 The issue here is whether the ORAP lien as it applies to the registered copyright
24 mortgages in the eight motion pictures is the equivalent of the UCC-1 discussed in
25 World Auxiliary so that it needed to have been filed in the Copyright office, or whether it
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1 falls within the "assignment of royalties" category discussed in BMI v. Hirsch where a
2 state assignment system is sufficient to perfect the lien.

3 Under California Code of Civil Procedure § 708.110(d), service of the ORAP
4 "creates a lien on the personal property of the judgment debtor...." Service of the ORAP
5 alone would create an enforceable lien in Franchise's property, even without a levy on
6 any property. In re Burns, 291 B.R. 846, 849 (9th Cir. BAP 2003); Imperial Bank v. Pim
7 Electric, Inc., 33 Cal. App. 4th 540, 552 (Ct. App. 1995). The property does not have to
8 be described in detail. Burns at 851; Imperial Bank at 553. It is specifically allowed to
9 be, in effect, a "secret" lien as it is not recorded or published. "Other creditors are able
10 to discover the lien only if they know about the creditor's judgment and review the court
11 file." Hon. Alan M. Ahart, Cal. Practice Guide: Enforcing Judgments & Debts §6:1306
12 (The Rutter Group 2007). The lien may be lost upon transfer of the property to certain
13 persons such a bona fide purchasers in the ordinary course of business. *Id.* at §6:1305,
14 citing CCP §§ 697.740, 697.910, 697.920.

15 While the assignment of future royalties may not be sufficiently related to the
16 underlying copyright to be subject to the Copyright Act, a lien on copyrights or copyright
17 mortgages, as is sought by the ORAP lien, is the type of encumbrance discussed in
18 World Auxiliary and Peregrine that the Copyright Act seeks to regulate. One significant
19 purpose of the Copyright Act is to give notice of any transfer of a registered copyright. A
20 "secret" lien such as an ORAP lien is inconsistent with the Copyright Act's purpose.
21 Hirsch simply does not involve rights analogous to an ORAP lien. Hirsch involved an
22 assignment of royalties for the purpose of satisfying a debt, not an assignment of a
23 security. The rationale for recordation – “to provide notice to prospective creditors or
24 purchasers of the copyright who may rely to their detriment on the appearance of
25 ownership of the rights under a copyright - is inapposite.” Hirsch, 104 F. 3d at 1166.

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1 Peregrine also held that a judicial lien is a transfer under the Copyright Act. 116
2 B.R. at 205-206. A judicial lien creditor is defined as "a creditor who has obtained a lien
3 'by judgment, levy, sequestration, or other legal or equitable process or proceeding'"
4 pursuant to 11 U.S.C. §101(32). Id. at 205. Morgan Creek's ORAP Lien, a judicial lien,
5 is a "transfer" subject to the Copyright Act. Since it is undisputed that the subject
6 copyrights were registered, the copyrights encumbered by the ORAP Lien can only be
7 perfected by recording in the U.S. Copyright Office pursuant to World Auxiliary, 303
8 F.3d 1120, 1128, which Morgan Creek failed to do. Thus, the copyrights encumbered
9 by the ORAP Lien are unperfected.

10 Partial summary judgment is granted in favor of Franchise with respect to this
11 claim. Whether any property aside from the copyrights is covered by the ORAP Lien is
12 not at issue in this motion and is not ruled on here.

13 **Second Claim for Relief**

14 Morgan Creek's second claim for relief in its First Amended Complaint is for
15 determination of validity, priority and extent of the Copyright Mortgages. Specifically,
16 Morgan Creek claims it is "entitled to a determination by this [c]ourt that the Copyright
17 Mortgages were, as of the Petition Date and at all relevant times thereafter, valid, duly
18 perfected and not avoidable liens against each of the motion pictures described therein
19 and the Proceeds thereof, and such Copyright Mortgages secure the obligations of
20 Franchise Entertainment, Franchise Pictures and, to the extent applicable, an Affiliate,
21 and each of them, for and on account of (a) participation claims, and (b) distribution
22 fees..." ("Claim #2). This claim depends largely on the interpretation of the different
23 agreements between the parties.

24 "Several contracts relating to the same matters, between the same parties, and
25 made as parts of substantially one transaction, are to be taken together." Cal. Civ.
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1 Code §1642; see also Cates Construction, Inc. v. Talbot Partners, 21 Cal. 4th 28. 39
2 (1999). Morgan Creek correctly argues that the 1998 Agreement and the Copyright
3 Mortgages are contracts "relating to the same matters, between the same parties, and
4 made as parts of substantially one transaction." Cal. Civ. Code §1642. The
5 interpretation of a contract must give effect to the mutual intention of the parties. Cal.
6 Civ. Code § 1636; G Ins. Co. of Mich. v. Homestore, Inc., 137 Cal. App. 4th 749, 755
7 (2006). The mutual intent of contracting parties is to be inferred, if possible, solely from
8 the written provisions of the contract. Homestore, 137 Cal. App. 4th at 755.
9 Under Travelers Cas. and Sur. Co. v. American Intern. Surplus Lines Ins. Co., 465
10 F.Supp. 2d 1005, 1012 (S.D. Cal. 2006), "[w]hen a contract is not ambiguous, summary
11 judgment may be entered based on the court's interpretation of clear and unambiguous
12 provision which present only questions of law."

13 Here, specific provisions of these agreements along with undisputed facts show
14 that the Copyright Mortgages do not encumber property or secure obligations of
15 Franchise. The agreements plainly (1) provide for Morgan Creek to own the distribution
16 rights and (2) are subject to the assignment to Warner Brothers for a term of ten years.
17 Morgan Creek has asked for time to conduct discovery as to the parties' intent in
18 drafting the agreements but has shown no area where the contracts are ambiguous to
19 question either of those basic facts. To the contrary, these factual matters are
20 undisputed and solely the legal conclusions to be drawn are in dispute.

21 Morgan Creek's Acquisition of Distribution Rights

22 Pursuant to their express terms, the Copyright Mortgages do not create a
23 present lien on any property of Franchise. There is no collateral under the Copyright
24 Mortgages because their express terms limit the collateral to revenues received from
25 distribution of the Motion Pictures in the Territory (Grant #1) and certain proceeds and
26

1 other property derived from or arising out of those distribution rights (Grant #2).
2 Franchise does not own any distribution rights because the distribution rights were
3 already assigned in perpetuity to Morgan Creek in 1998.

4 Morgan Creek explains that no distribution rights were transferred in 1998
5 because no Motion Pictures existed at that time and the 1998 Agreement contained a
6 future promise that when the Motion Pictures were made, Morgan Creek would obtain
7 distribution rights in the films. Morgan Creek believes that the 1998 Agreement and the
8 Copyright Mortgages, read together, create a valid and enforceable security interest for
9 Morgan Creek. While the 1998 and 2000 agreements must be read together, it is not
10 clear how this argument benefits Morgan Creek. Regardless of whether the 1998
11 agreement alone or only in conjunction with the subsequent agreements granted the
12 distribution rights, there is no dispute that Morgan Creek acquired the distribution rights
13 at least by the time the Copyright Mortgages were obtained in 2000 and certainly before
14 Franchise filed bankruptcy.

15 At the time Franchise filed bankruptcy, and at all times thereafter, Franchise had
16 no interest in the collateral under the Copyright Mortgages. The transfer of the
17 exclusive distribution rights was perfected by exclusive licenses granted to Morgan
18 Creek in Paragraph 1 of the Copyright Mortgages, which were then recorded in the
19 Copyright Office. Under the Copyright Revision Act of 1976, 17 U.S.C. § 101, *et seq.*,
20 the exclusive license of distribution rights in perpetuity in virtually all media in the
21 Territory effected a transfer or a completed assignment of the distribution rights to
22 Morgan Creek. See 17 U.S.C. § § 101, 106, & 201. Since Franchise had no interest in
23 the collateral, the Copyright Mortgages did not and do not encumber any property of the
24 Franchise Estates. See Zenith Productions Ltd. V. AEG Acquisition Corp. (In re AEG
25 Acquisition Corp.), 161 B.R. 50, 59-60 (9th Cir. BAP 1993), *aff'g Official Unsecured*
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1 Creditor's Committee v. Zenith Productions, Ltd (In re AEG Acquisition Corp.), 127 B.R.
2 34 (Bankr. C.D. Cal 1991) (under Copyright Act, exclusive licenses are transfers of
3 copyright ownership and a prepetition grant of an exclusive license is a completed
4 prebankruptcy transfer).

5 The question does arise, however, of why the Copyright Mortgages would
6 purport to grant Morgan Creek a "continuing security interest and . . . copyright
7 mortgage on" the distribution rights and certain proceeds and property derived
8 therefrom. This was actually explained by Morgan Creek's declarant, David Nochimson.
9 Mr. Nochimson, a highly experienced entertainment attorney who participated in drafting
10 the agreements, explained that:

11 it is standard in the motion picture industry for a party who previously entered
12 into an agreement to acquire distribution rights in a motion picture (or
13 pictures) that was not in production at the time of the agreement, to enter into
14 a second agreement after the motion picture is produced. This second
15 agreement identifies the then-produced motion picture and grants the
16 distribution rights (because there were no such rights to grant at the time of
17 the first agreement). The second agreement nearly always also grants a
security interest in and copyright mortgage on the motion picture to secure
the acquiring party's right to have the benefit of the distribution rights
throughout the term of the distribution agreement and its right to receive
revenue from the exploitation of the motion picture. Security interests of this
type are used by distributors (such as Morgan Creek and every major studio)
to protect them against a producer (such as Franchise).

18 See Nochimson Decl. ¶ 12. This interest was taken protectively in case the debtor or
19 another party challenged Morgan Creek's distribution rights during the bankruptcy
20 proceeding. This conceivably could have happened here if Franchise had claimed that
21 the contract were executory and had sought to reject it. In fact, the contrary occurred -
22 Morgan Creek has been attempting to enlarge its rights under the contract while
23 Franchise has continuously respected Morgan Creek's exclusive distribution rights.
24 Because Morgan Creek's exclusive distribution rights have never been challenged,
25 neither Grant #1 nor Grant #2 have ever been necessary to invoke.

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1 Typographical Error

2 Franchise also argues that Grant #2 is based on a nonexistent security interest
3 in the Copyright Mortgages, and since Franchise had no prior copyright mortgage to
4 grant Morgan Creek, there is a nonexistent collateral. Morgan Creek counters by
5 stating that there was a typographic error in Paragraph 2(b) that resulted from mutual
6 mistake and that "copyright mortgage" is intended to mean "copyright." Morgan Creek
7 argues that there was a typographical error in Grant #2 - that the phrase "hereby grants
8 and assigns to Secured Party a continuing security interest in and to the copyright
9 mortgage on all of Debtor's right,..." should instead read "a continuing security interest
10 in and copyright mortgage ", leaving out the words "to the". This drafting error is
11 explained in the declaration of David Nochimson who participated in the drafting of
12 each of the agreements at issue. Declaration of David Nochimson ("Nochimson Decl."),
13 ¶¶ 6-11.

14 Under Maffei v. Northern Ins. Co. of New York, 12 F.3d 892, 898 (9th Cir. 1993),
15 "[w]hether contract provision is ambiguous is a question of law. If it is, ordinary
16 summary judgment is improper because differing views of the intent of the parties will
17 raise genuine issues of material fact." Under Brobeck, Phleger & Harrison v. Telex
18 Corp., 602 F.2d 866, 871-872 (9th Cir. 1979), "[e]ven if the written agreement is clear
19 and unambiguous on its face, the trial judge must receive relevant extrinsic evidence
20 that can prove a meaning to which the language of the contract is reasonably
21 susceptible. If the court finds after considering this preliminary evidence that the
22 language of the contract is not reasonably susceptible of interpretation and is
23 unambiguous, extrinsic evidence cannot be received for the purpose of varying the
24 terms of the contract...The case may then be disposed of by 'summary judgment.'
25 Since inferences drawn from underlying facts must be viewed in light favorable to
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1 Morgan Creek and it appears that there may have been a typographic error and/or
2 mutual mistake, the contract provision will be read as proposed by Morgan Creek for
3 purposes of this motion. To the extent that Franchise's argument turns on the
4 interpretation of this phrase, the phrase will be reformed as explained in the Nochimson
5 declaration. This reformation, however, does not change the result of the agreement –
6 it still grants all distribution rights to Morgan Creek.

7 Warner Brothers Distribution Term

8 Even if the Distribution Rights and Proceeds Collateral had present value, the
9 Copyright Mortgages do not become enforceable until after the expiration of a ten-year
10 distribution term granted to Warner Brothers. Morgan Creek's contention that it has a
11 present perfected lien on a present interest that is simply subject to Warner Brother's
12 ten-year distribution term is inconsistent with both the language of the agreements and
13 the California Commercial Code.

14 The language of the Copyright Mortgages states that Morgan Creek's security
15 interests secure rights after the Warner Distribution term. Grant #1 specifically states
16 "[i]n order to secure Secured Party's [Morgan Creek's] Distribution Rights in the Picture
17 for the Territory after the Warner Distribution Term..." Grant #2 of the Copyright
18 Mortgages similarly limit Morgan Creek's continuing security interest in
19 "proceeds...derived from or arising out of the Distribution Rights...after the Warner
20 Distribution Term, and all other items deemed Inventories, Equipment, Accounts and
21 General Intangibles...derived from or arising out of the Distribution Rights in the
22 Territory after the Warner Distribution Term." It is undisputed that the Warner
23 Distribution Term has not ended.

24 Pursuant to California Commercial Code §9203(a), "[a] security interest attaches
25 to collateral when it becomes enforceable against the debtor with respect to the
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1 collateral, unless an agreement expressly postpones the time of attachment." Pursuant
2 to California Commercial Code §9203(b): "...a security interest is enforceable against
3 the debtor and third parties with respect to the collateral only if each of the following
4 conditions is satisfied...(2) The debtor has rights in the collateral or the power to transfer
5 rights in the collateral to a secured party."

6 Morgan Creek is not a secured party under the express language of the
7 Copyright Mortgages since its security interest does not arise until after the ten-year
8 Warner Brothers Distribution Term - hence, there is no present security interest under
9 the Copyright Mortgages. (Copyright Mortgages 2(a), 2(b)); Cal. Civ. Code § 1636;
10 Homestore, 137 Cal. App. 4th at 755.

11 Franchise's final argument is that the Copyright Mortgages do not secure the
12 major portion of the debt evidenced by the Judgment. Based on the above ruling, there
13 is no need to address what parts of the state court judgment represented secured debt.
14 Numerous other issues were raised in the briefs, but none of them are necessary to
15 address further.

16 **Seventh Claim for Relief**

17 Morgan Creek's seventh claim for relief is for turnover of monies subject to
18 secured claims. Specifically, Morgan Creek requests that it "is entitled to the immediate
19 turnover of all monies, including the Proceeds, subject to the various judgment liens,
20 Copyright Mortgages, security interests and other interests of Morgan Creek as
21 hereinabove described". As the funds held by Franchise are not secured, there is no
22 basis for an immediate turnover of monies subject to Morgan Creek's claims.

24 **IV. CONCLUSION**

25 While summary judgment should be granted with caution, Anderson v. Liberty
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1 Lobby, 477 U.S. 242, 255 (1986), the litigation between these parties now spans six
2 years and two courts, and the above issues can be decided as a matter of law, even
3 making all reasonable inferences and resolving all disputed facts in favor of Morgan
4 Creek. Franchise's partial summary judgment motion is granted.

5 For the foregoing reasons, partial summary judgment should issue in Franchise's
6 favor, with holdings that: Morgan Creek does not have any secured claims on any
7 property of Franchise by reason of the Copyright Mortgages; Morgan Creek's State
8 Court Liens are not perfected or enforceable; and the Copyrights do not secure the
9 indebtedness under the State Court Judgment.

10 The request for a F.R.C.P. Rule 56(f) continuance is denied.

11
12 DATED: 1/25/08

13
14 _____
/s/

15 **MAUREEN A. TIGHE**
16 United States Bankruptcy Judge
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26

CERTIFICATE OF SERVICE BY MAIL

JAN 25 2008

I certify that a true copy of this **ORDER** was mailed on _____

to the parties listed below:

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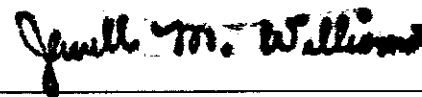
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DEPUTY CLERK